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BEFORE THE ARIZONA CORPORATION COMMISSION

2009 JUN -9 A 11: 50

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Commissioner

QWEST CORPORATION,

Complainant,

v.

**MCLEODUSA TELECOMMUNICATIONS
SERVICES, INC., d/b/a PAETEC BUSINESS
SERVICES.**

Respondent.

DOCKET NO T-01051B-09-0307
T-03267A-09-0307

**FORMAL COMPLAINT OF
QWEST CORPORATION**

McLeodUSA Complaint
DOCKETED

JUN - 9 2009

nr

Pursuant to A.A.C. R14-3-106(L) Qwest Corporation ("Qwest") brings the following Complaint against McLeodUSA Telecommunications Services, Inc., d/b/a PAETEC Business Services ("McLeod") and alleges as follows:

NATURE OF THE ACTION

1. McLeod charges Qwest a "Wholesale Service Order Charge" (sometimes referred to below as the "Charge") in the amount of \$24.24 when an Arizona end-user telecommunications customer switches its intrastate telecommunications service provider from McLeod to Qwest. Qwest does not charge any fee in like circumstances, and neither does any other telecommunications carrier in Arizona. McLeod only assesses its Charge against Qwest. Qwest challenges the Charge on the grounds that McLeod incurs little or no cost, on the grounds

1 that it is discriminatorily applied, and on the grounds that the Charge creates an artificial barrier
2 to competition. Qwest seeks an order declaring that McLeod's Wholesale Service Order Charge
3 is unjust, unreasonable, and unlawfully discriminatory, under the laws applicable to public
4 service corporations providing telecommunications services in Arizona.

5
6 **PARTIES**

7 2. Qwest is a Delaware corporation with its principal offices located in Denver,
8 Colorado. Qwest is a telecommunications corporation as defined in A.R.S 40-201(26) and is an
9 incumbent local exchange company ("ILEC"), as defined in 47 U.S.C. § 251(h). Qwest provides
10 local exchange and other telecommunications services in the State of Arizona.

11 3. McLeod is an Iowa corporation and is a telecommunications corporation as
12 defined in A.R.S. 40-201(26). McLeod holds a certificate of convenience and necessity issued
13 by the Arizona Corporation Commission ("Commission") authorizing McLeod to provide
14 facilities-based and resold local exchange and long distance telecommunications services in
15 Arizona.

16 4. McLeod's address of record is as follows:

17 McLeodUSA Telecommunications Services, Inc.
18 d/b/a PAETEC Business Services
19 One Martha's Way
Hiawatha, Iowa 52233

20 5. McLeod's regulatory counsel in Arizona is:

21 Michael W. Patten
22 Roshka Dewulf & Patten, PLC
23 One Arizona Center
400 East Van Buren Street, Suite 800
Phoenix, Arizona 85004

24 6. All correspondence, notices, inquiries, and orders regarding this Complaint should
25 be served on the following individuals for Qwest:
26

1 Norman G. Curtright
2 Corporate Counsel
3 Qwest Corporation
4 20 East Thomas Road, 16th Floor
5 Phoenix, AZ 85012

6 Reed Peterson
7 Staff Advocate-Legal
8 Qwest Corporation
9 20 East Thomas Road, 16th Floor
10 Phoenix, AZ 85012

11 JURISDICTION

12 7. The Commission has jurisdiction over this Complaint and the Respondent
13 pursuant to A.R.S. 40-202, A.R.S. 40-203 and A.R.S. 40-248, and other statutes cited herein.

14 BACKGROUND OF DISPUTE

15 8. McLeod assesses a Wholesale Service Order Charge on Qwest when Qwest wins
16 a customer away from McLeod. The Wholesale Service Order Charge is provided for by
17 McLeod's tariff, or price list, or catalog in Washington, Arizona, Utah, New Mexico, and Iowa,
18 and possibly other states as well. The tariff provisions in Arizona addressing the Wholesale
19 Service Order Charges are contained in McLeod's Tariff Arizona C.C. No. 3, Section 7.0, a copy
20 of which is attached to this complaint at Exhibit A. The tariff was effective April 7, 2004, and
21 continues in effect.

22 9. McLeod does not assess this Charge on any other carrier who wins a customer
23 away from McLeod. Thus, the Wholesale Service Order Charge operates to penalize Qwest for
24 winning a customer from McLeod, but the same penalty is not assessed on any other carrier.

25 10. The Wholesale Service Order Charge is not cost-based, and there is no legal,
26 factual, or policy justification to impose this Charge.

11. Qwest has requested that McLeod eliminate the Wholesale Service Order Charge. Qwest and McLeod engaged in settlement negotiations to resolve a number of business disputes between them, but McLeod has refused to eliminate its Wholesale Service Order Charge.

12. On or about October 10, 2008, Qwest and McLeod entered into a Settlement Agreement whereby they resolved a number of other business disputes. They could not resolve their disagreement about the Charge, however, and it was determined that Qwest would have to take its complaint about the unlawfulness of the Charge to the Commission for resolution. This Complaint is Qwest's challenge to the Wholesale Service Order Charges in Arizona.

13. The parties' understanding with regard to the Wholesale Service Order Charges was memorialized in a "Settlement Agreement and Mutual Release" ("Settlement Agreement"), which is a confidential document. Pursuant to the Settlement Agreement, Qwest and McLeod agreed to enter in Arizona a "Wholesale Service Order Charge Amendment" ("Amendment") to the parties' interconnection agreement ("ICA"). The Amendment is attached to this complaint as Exhibit B. The Amendment was filed with this Commission and approved by operation of law on February 19, 2009.

14. The Settlement Agreement specifically preserves Qwest's rights to challenge the Wholesale Service Order Charge. The Amendment, in Attachment 1, paragraph 2, also specifically preserves Qwest's rights to challenge the Wholesale Service Order Charge. If the Commission determines that the Wholesale Service Order Charge is unjust, unreasonable, unlawful, or otherwise unenforceable, the Amendment is deemed terminated on the effective date of the Commission's final order.

FACTS

15. McLeod imposes the Wholesale Service Order Charge on Qwest when Qwest wins a customer from McLeod. Under the Amendment, the amount of the Charge is \$24.24 each

1 occurrence. This is the case regardless of whether Qwest solicited the customer or the customer
2 decided to make the change on his or her own initiative.

3 16. McLeod claims that its charge is levied in order to create "parity" with charges
4 Qwest assessed against McLeod. But, while McLeod leases facilities from Qwest to serve its
5 end-users, Qwest does not buy any services from McLeod to serve Qwest's end-users. Qwest
6 does not purchase or lease unbundled network elements from McLeod in Arizona, and does not
7 order retail or wholesale services from McLeod. Accordingly, McLeod incurs no costs that
8 McLeod may properly impose on Qwest when a customer switches providers away from
9 McLeod.

10 17. McLeod's Wholesale Service Order Charge does not relate to any wholesale
11 service order that Qwest places with McLeod. (Qwest does notify McLeod when a McLeod
12 customer moves to Qwest or to another service provider, but Qwest does not place an order for
13 wholesale products or services with McLeod.) McLeod does not apply the Charge to other
14 carriers in the state. The Charge works as a disincentive for Qwest to compete for customers
15 who might be served by McLeod.

16 18. Qwest does not charge McLeod to process a change order when a Qwest customer
17 leaves Qwest to take service from McLeod.

18 19. Pursuant to its approved ICA, McLeod pays Qwest various charges for access to
19 unbundled elements, if McLeod chooses to serve its new customer via unbundled elements
20 leased from Qwest. Under the parties' ICA, Qwest imposes a connection charge on McLeod
21 when McLeod orders an unbundled loop from Qwest. The amount charged is a rate approved by
22 the Commission for that specific service that Qwest provides to competitive local exchange
23 carriers such as McLeod, in a wholesale cost docket. In providing the unbundled loop, Qwest is
24 performing a wholesale service for McLeod. The charge for that unbundled loop installation
25 applies regardless of whether McLeod has won the customer from Qwest, from another CLEC,
26

1 or if the customer has never received service before and is a new connection. Qwest does not
2 assess a charge to disconnect a UNE loop in Arizona.

3 20. McLeod's Wholesale Service Order Charge not only singles out Qwest, it also
4 presents an obstacle to Qwest in signing up new customers from McLeod. The Charge makes it
5 more costly for Qwest to convert McLeod customers than the customers of other CLECs, thus
6 discouraging Qwest from marketing to McLeod customers.

7 21. McLeod's Wholesale Service Order Charge tariff has been found to be unlawful
8 by the Minnesota Public Utilities Commission. A copy of the Minnesota Order is attached
9 hereto as Exhibit C.

10 22. McLeod attempted to file a tariff in Colorado containing the Wholesale Service
11 Order Charge, but withdrew that filing when Qwest filed a challenge to that tariff.

13 CLAIMS

14 *Violation of State Law*

15 23. Qwest reasserts and realleges the statements set forth in paragraphs 1-22.

16 24. McLeod's Wholesale Service Ordering Charge is unjust, unreasonable, and
17 discriminatory, in violation of ARS 40-202, ARS 40-248, ARS 40-334, and ARS 40-361(A).

18 *Violation of Federal Law*

19 25. Qwest reasserts and realleges the statements set forth in paragraphs 1-24.

20 26. McLeod's imposition of the Wholesale Service Order Processing charge through
21 a tariff violates Telecommunications Act of 1996, 47 U.S.C. 151, *et seq.*, specifically sections
22 251 and 252 which require such charges to be negotiated or arbitrated.

24 RELIEF REQUESTED

25 Wherefore, Qwest respectfully requests the Commission enter an order holding and
26 providing that:

1 (1) McLeod's Wholesale Service Order Charge is discriminatory in violation of state
2 and federal law;

3 (2) McLeod's Wholesale Service Order Charge is anti-competitive in violation of
4 state and federal law;

5 (3) McLeod's Wholesale Service Order Charge is unjust or unreasonable, or
6 otherwise in violation of law and public policy;

7 (4) McLeod's Tariff Section 7.0 shall be stricken from schedules of rates and charges
8 that McLeod may assess, and of no further force or effect;

9 Together with such other and further relief that the Commission deems fair, just, and
10 reasonable.

11
12 DATED this 9th day of June, 2009.

13 QWEST CORPORATION

14
15
16 By: 

17 Norman G. Curtright
18 Corporate Counsel
19 20 East Thomas Road, 16th Floor
20 Phoenix, Arizona 85012
21 Telephone: (602) 630-2187
22
23
24
25
26

1 ORIGINAL and 13 copies hand-delivered
2 for filing this 9th day of June, 2009, to:

3 Docket Control
4 ARIZONA CORPORATION COMMISSION
5 1200 West Washington Street
6 Phoenix, AZ 85007

7 Copy of the foregoing hand-delivered
8 this 9th day of June, 2009, to:

9 Maureen Scott, Esq.
10 Legal Division
11 Arizona Corporation Commission
12 1200 West Washington
13 Phoenix, Arizona 85007

14 Ernest G. Johnson, Esq.
15 Director, Utilities Division
16 Arizona Corporation Commission
17 1200 West Washington
18 Phoenix, Arizona 85007

19 Copy of the foregoing mailed
20 this 9th day of June, 2009, to:

21 Michael W. Patten
22 ROSHKA DEWULF & PATTEN, PLC
23 One Arizona Center
24 400 East Van Buren Street, Suite 800
25 Phoenix, Arizona 85004
26 Attorney for McLeodUSA Telecommunications Services, Inc.
d/b/a Paetec Business Services

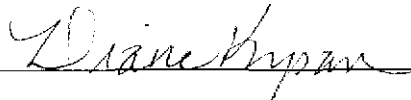


EXHIBIT A

7.0 Wholesale Services

(N)

7.1 Wholesale Service Order Processing:

A Wholesale Service Order charge applies to all providers of telecommunications services that assess a non-recurring charge on McLeodUSA for the processing of comparable orders submitted by McLeodUSA to initiate service using network elements leased from the incumbent local exchange carrier ("ILEC"). A Requesting Carrier may submit an LSR during regular business hours of McLeodUSA. One LSR must be submitted for each retail end user switching from McLeodUSA to the Requesting Carrier. McLeodUSA will process an LSR and return a firm order commitment (FOC) to the requesting carrier within 48 hours of receipt. A Wholesale Service Order Charge shall be charged for each LSR received, whether accepted as valid or rejected as invalid. LSRs may be rejected for inaccurate, incomplete, or repetitive LSRs. An additional Service Order Charge applies when the Requesting Carrier cancels an LSR request. A separate Service Order Supplemental Charge applies when a Requesting Carrier submits an LSR that modifies or supplements the initial LSR. A Requesting Carrier may request expedited processing of the LSR within 24 hours for an additional Expedite Fee. A Forced Expedite Fee applies if the Requesting Carrier converts a retail customer's service before the Firm Order Commitment Date that causes McLeodUSA to expedite its required activities. An additional charge also applies to an LSR Expedite Order that involves a loop disconnect. A full set of Business Rules is available from McLeodUSA.

7.1.1 Rates:

The Wholesale Service Order charge is equal to the Service Order Charge (or a comparable charge assessed upon receipt of an order) contained in the ICA between McLeodUSA and the incumbent local exchange carrier for the state in which the retail end user resides.

If the ICA does not set forth non-recurring charges identified as a Service Order Charge, Service Order Supplemental Charge, Expedite Fee, or Forced Expedite Fee charge, or comparable items, the following charges apply:

Wholesale Service Order	\$20
Service Order Supplemental Charge	\$15
Expedite Fee*	\$40
Forced Expedite Fee*	\$75

For Expedite or Forced Expedite Request involving Loop Disconnect, the applicable charge applies in addition to a pass through of any monthly recurring charges for an unbundled loop charged by the ILEC after Customer conversion to Requesting Carrier's service.

(N)

Issued: March 2, 2004

Effective: April 1, 2004

BY: David R. Conn
Vice President and Deputy General Counsel
One Martha's Way, P.O. Box 3177
Hiawatha, Iowa 52233-3177

EXHIBIT B

**Wholesale Service Order Charge Amendment
To the Interconnection Agreement between
Qwest Corporation and McLeodUSA Telecommunications Services, Inc.
dba PAETEC Business Services
for the state of Arizona**

This is an Amendment ("Amendment") to the Interconnection Agreement between Qwest Corporation ("Qwest"), a Colorado corporation, and McLeodUSA Telecommunications Services, Inc. dba PAETEC Business Services ("CLEC"), an Iowa corporation. CLEC and Qwest shall be known jointly as the "Parties".

RECITALS

WHEREAS, CLEC and Qwest entered into an Interconnection Agreement ("Agreement") for service in the state of Arizona which was approved by the Arizona Corporation Commission ("Commission"); and

WHEREAS, CLEC maintains a tariff or price list on file in the State of Arizona which requires Qwest, when submitting orders to process a customer conversion from CLEC to Qwest to compensate CLEC for the activities that CLEC claims is required to process the order (the "Wholesale Service Order Charge"); and

WHEREAS, Qwest has disputed the lawfulness of the CLEC tariff or price list and its application to Qwest, resulting in litigation filed by CLEC against Qwest and subsequently a settlement between Qwest and CLEC regarding, among other issues, CLEC's claim for compensation for Wholesale Service Order Charges; and

WHEREAS, the Parties wish to amend the Agreement further under the terms and conditions contained herein to implement the terms of the settlement related to this particular dispute.

AGREEMENT

NOW THEREFORE, in consideration of the mutual terms, covenants and conditions contained in this Amendment and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

Amendment Terms

The Agreement is hereby amended by adding terms, conditions and rates pursuant to which CLEC will invoice Qwest for and Qwest will pay Wholesale Service Order Charges. The terms of the Parties' agreement are set forth and specified in Attachment 1 and the Pricing Exhibit to this Amendment, which is incorporated herein by this reference.

Effective Date

This Amendment shall be deemed effective upon approval by the Commission; however, the Parties may agree to implement the provisions of this Amendment upon execution, with such implementation relating to payment of charges contemplated in this Amendment being subject to true-up with an effective bill date of August 1, 2008. To accommodate this need, CLEC must generate, if necessary, an updated Customer

Questionnaire. In addition to the Questionnaire, all system updates will need to be completed by Qwest. CLEC will be notified when all system changes have been made. Actual order processing may begin once these requirements have been met. Additionally, Qwest shall implement any necessary billing changes within two (2) billing cycles after the latest execution date of this Amendment, with a true-up back to the latest execution date of this Amendment by the end of the second billing cycle. The Parties agree that so long as Qwest implements the billing changes and the true-up as set forth above, the CLEC's bills shall be deemed accurate and adjusted without error.

Further Amendments

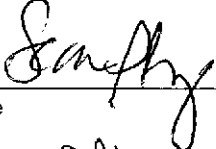
Except as modified herein, the provisions of the Agreement shall remain in full force and effect. The provisions of this Amendment, including the provisions of this sentence, may not be amended, modified or supplemented, and waivers or consents to departures from the provisions of this Amendment may not be given without the written consent thereto by both Parties' authorized representatives. No waiver by any Party of any default, misrepresentation, or breach of warranty or covenant hereunder, whether intentional or not, will be deemed to extend to any prior or subsequent default, misrepresentation, or breach of warranty or covenant hereunder or affect in any way any rights arising by virtue of any prior or subsequent such occurrence.

Entire Agreement

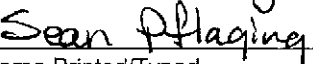
The Agreement as amended (including the documents referred to herein) constitutes the full and entire understanding and agreement between the Parties with regard to the subjects of the Agreement as amended and supersedes any prior understandings, agreements, or representations by or between the Parties, written or oral, to the extent they relate in any way to the subjects of the Agreement as amended.

The Parties intending to be legally bound have executed this Amendment as of the dates set forth below, in multiple counterparts, each of which is deemed an original, but all of which shall constitute one and the same instrument.

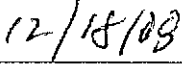
**McLeodUSA Telecommunications.
Services, Inc.
dba PAETEC Business Services**



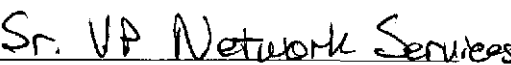
Signature



Name Printed/Typed

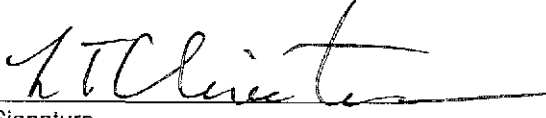


Title

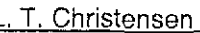


Date

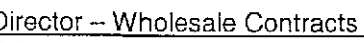
Qwest Corporation



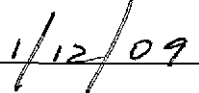
Signature



Name Printed/Typed



Title



Date

ATTACHMENT 1

TO WHOLESALE SERVICE ORDER CHARGE AMENDMENT

1. **CLEC Wholesale Service Order Charges** Qwest agrees that pursuant to the terms of the Amendment, Qwest will not dispute CLEC's properly stated and documented invoices for Wholesale Service Order charges associated with orders submitted by Qwest to transfer a CLEC customer to Qwest, and will pay such invoices according to the payment terms of the Agreement. The invoices will be deemed properly stated and documented if they are provided by McLeod in electronic spreadsheet format (e.g., Excel, Access or equivalent format) and, for each charge, McLeod provides Qwest with Qwest's PON, the phone number to which the service applies, and the date McLeod provides the service for that phone number. The rates applicable to CLEC's Wholesale Service Order charges to Qwest are as listed in Exhibit 1 hereto. The Parties agree that Qwest has not waived its rights to dispute invoices for Wholesale Service Order charges for accuracy or other such reasons not related to the applicability of the Amendment.

2. **Without Prejudice** a. The Parties agree that Qwest reserves its rights to challenge CLEC's Wholesale Service Order tariff provisions before the Commission or before the utility commissions of other states. The Parties further agree that Qwest's agreement to the Amendment is and shall be without prejudice to any position that Qwest may take in the event that Qwest institutes any challenge to CLEC's Wholesale Service Order tariff provisions in the future. In the litigation of any such challenge, CLEC shall not make any argument in support of its tariffs based on the Amendment or on Qwest's agreement to enter the Amendment, including but not limited to any argument that the Amendment evidences Qwest's acceptance of CLEC's right to collect charges for the activities identified in the Amendment. b. It is the intent of the Parties to negotiate in good faith whether terms and rates similar to those in the Amendment should be included in the successors to the Agreement. Neither Qwest nor CLEC waive any position it may take with respect to negotiations in any successor agreements.

3. **Termination.** The Amendment shall continue in force until the earliest of these events: a. The parties mutually agree to terminate it, including but not limited to the execution and approval of a successor to the Agreement; or b. The Commission issues a Final Order that the Wholesale Service Order charge provisions in McLeodUSA's tariff in this state are unjust, unreasonable, unlawful or otherwise unenforceable, in which case this Amendment shall be deemed terminated in this state with respect to charges for any Wholesale Service Orders after the effective date of the Commission's order.

PRICING EXHIBIT

<u>State</u>	<u>McLeodUSA Rate</u>
Arizona	\$ 24.24
Idaho	\$ 16.22
Iowa	\$ 20.70
Montana	\$ 23.94
Nebraska	\$ 24.87
New Mexico	\$ 29.23
North Dakota	\$ 24.87
Oregon	\$ 17.09
South Dakota	\$ 24.87
Utah	\$ 13.10
Washington	\$ 21.24
Wyoming	\$ 17.36

EXHIBIT C

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayner
Marshall Johnson
Ken Nickolai
Phyllis A. Reha

Chair
Commissioner
Commissioner
Commissioner

JUL 23 14

In the Matter of McLeodUSA's Tariff Filing
Introducing Wholesale Order Processing
Charges that Apply When McLeodUSA's
Customers Shift to Other Telecommunications
Carriers

ISSUE DATE: July 22, 2004

DOCKET NO. P-5323/M-04-395

ORDER REJECTING PROPOSED
WHOLESALE SERVICE CHARGE

PROCEDURAL HISTORY

On March 15, 2004, McLeodUSA Telecommunications Services, Inc. (McLeod) filed revisions to its telephone tariff. This proposed tariff revision implements a wholesale service order processing charge applicable to all providers of telecommunication services that assess a non-recurring charge on McLeod for the processing of comparable orders submitted by McLeod to initiate service using network elements leased from the incumbent local exchange carrier (ILEC).

On May 13, 2004, the Department of Commerce (DOC) filed comments. The DOC recommended that McLeod's tariff be rejected on grounds that it violates both federal and state law.

On May 14, 2004, Qwest Corporation (Qwest) filed comments opposing McLeod's tariff as discriminatory, anticompetitive and unreasonable and in violation of Minnesota law.

The matter came before the Commission on July 8, 2004.

FINDINGS AND CONCLUSIONS

I. McLeod's Tariff Proposal

McLeod's proposed tariff provides that a service order charge would apply when a McLeod customer switches service to another telecommunications carrier and that carrier assesses a similar fee on McLeod when that telecommunications carrier's customer switches to McLeod.

Further, the proposed tariff provides that the wholesale service order charge would be equal to a service order charge (or some comparable charge) in an Interconnection Agreement (ICA) between McLeod and the incumbent local exchange carrier (ILEC). In the event that the ICA does not contemplate non-recurring charges identified as a service order charge, a service order supplemental charge, an expedite fee or a forced expedite fee, the tariff would establish the charge.

The proposed service order charge in McLeod's tariff would range from \$20, for a wholesale service order, to \$75, for a forced expedite fee.¹ The charges would apply only to telecommunications carriers, not retail end users. In practice, the charge would only apply to Qwest.

II. The Parties' Positions

A. McLeod

At hearing McLeod argued that its goal in introducing the proposed tariff was to obtain parity between McLeod and any telecommunications service providers that charge McLeod an order processing charge for comparable orders. McLeod indicated that only Qwest imposes such a charge.

At hearing, McLeod argued that the charge in the proposed tariff would only apply reciprocally and that McLeod would only charge the amount charged by another carrier, in this case Qwest. McLeod argued that Qwest charged McLeod an installation fee of \$2.38/line.

McLeod also stated at hearing that it had submitted a draft ICA amendment to Qwest for consideration.

Finally, at hearing, McLeod requested that, in the alternative, the tariff be allowed to go into effect temporarily with the understanding that the parties would negotiate an amendment to the ICA.

B. Qwest

Qwest argued that McLeod's tariff is unreasonable, anticompetitive and discriminatory. Qwest argued that, contrary to McLeod's statement, Qwest does not charge McLeod anything for processing orders to change service providers when a Qwest retail customer switches its service to McLeod. Qwest argued that it was in the same position as any other telecommunications carrier and the imposition of a charge by McLeod would be discriminatory.

Qwest stated that as a wholesale service provider to McLeod, Qwest does charge a non-recurring unbundled loop disconnect charge of \$1.95 for disconnecting an unbundled loop. Such charge is assessed whether or not the customer disconnects service entirely or switches to a different provider. The disconnect charge is to recover the cost of disconnecting the service. It is not designed to recover costs associated with transferring a retail customer to another provider.

¹ McLeod Tariff No. 3, Section 7.1.1.

Further, Qwest argued, imposing a charge of \$20 or more, as McLeod has proposed when a McLeod customer switches to Qwest, would create an uneven playing field when competing for Minnesota customers. Qwest argued that McLeod's tariff is designed to punish customers that use Qwest as a retail service provider, without any corresponding punishment if the customer chooses to change to another provider.

C. DOC

The DOC argued that this matter should be handled as an amendment to the parties' ICA. The DOC argued that because McLeod did not attempt to negotiate an amendment to its ICA and instead attempted to bypass negotiations by unilaterally filing a tariff, the filing of the tariff is preempted by the Federal Telecommunications Act of 1996² and should be rejected.

Further, the DOC argued that the proposed tariff is defective under state law.³ First, it is discriminatory as it only applies to Qwest. In this case, when Qwest wins customers away from McLeod, Qwest would be required to pay the fee set forth in the tariff. The fee would be an obstacle to Qwest in soliciting and signing up new customers. The only way a carrier could avoid the fee would be by not soliciting McLeod customers. This would impair fair competition in violation of MN rules.

The DOC also argued that the cost information that McLeod submitted to show how it arrived at the wholesale service charge in its tariff was inadequate to support the proposed charges.

Finally, the DOC argued that the tariff allows McLeod to disconnect services after a ten day written notice but does not make it clear that it would seek Commission approval before discontinuing this service, as required by Minnesota Rules.⁴

² Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of title 47, United States Code).

³ Minn. Rules part 7812.2210, subp. 5 (CLEC may not offer telecommunication service within the state on terms or rates that are unreasonably discriminatory, with certain exceptions); Minn. Rules part 7812.2210, subp. 8 (CLEC's local services are not subject to price or rate regulation, except if the Commission determines that: B. the pricing or pricing practice is unreasonably discriminatory in violation of subpart 5; D. the price or pricing practice will impede the development of fair and reasonable competition...)

⁴ Minn. Rules part 7812.2210, subp. 11.

III. Commission Action

A. Summary of Commission Action

Under Minn. Stat. § 237.035, competitive local exchange carriers (CLECs), such as McLeod, are exempt from rate regulation and most of the other regulatory requirements that apply to incumbent local exchange carriers, such as Qwest. With proper notice, CLECs are permitted to change their rates without regulatory review and without cost support, provided that the new rates are not unreasonably discriminatory,⁵ will not impede the development of fair and reasonable competition,⁶ and do not otherwise conflict with state or federal law.⁷

In this case, the proposed tariff appears to run afoul of all three exceptions – it unreasonably discriminates against Qwest; it acts to impede the development of a thriving telecommunications marketplace; and it violates the purpose, if not the letter, of the federal Telecommunications Act of 1996 (the Act).⁸ The Commission will therefore reject the tariff.

Finally, both Qwest and McLeod have stated their desire to resolve the issues underlying the proposed tariff through the interconnection negotiation process of 47 U.S.C. §§ 251 and 252. The Commission agrees that that is the most appropriate procedural vehicle and will advise the parties to focus their energy and resources on that process.

These actions will be explained in turn.

B. The Proposed Tariff is Unreasonably Discriminatory

The tariff would apply only to Qwest even though there are a wide range of service providers to which a McLeod customer could decide to transfer.

On its face the tariff is not reciprocal. The tariff proposes to impose higher charges on Qwest than Qwest imposes for what McLeod views as the same services.

⁵ Minn. Stat. § 237.74, subds. 2 and 4; Minn. Rules, part 7812.2210, subp. 8 B.

⁶ Minn. Stat. § 237.16, subd. 8 (6) and (7); Minn. Rules, part 7812.2210, subp. 8 D.

⁷ Minn. Rules, part 7812.2210, subp. 8 C.

⁸ Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of title 47, United States Code).

C. The Proposed Tariff Impedes the Development of Competition

The provisions of the proposed tariff would not only single out Qwest but would also present an obstacle to Qwest in soliciting and signing up new customers from McLeod. It would be much more costly for Qwest to convert McLeod customers than the customers of other CLECs, thus giving McLeod an unfair advantage over other CLECs when competing with Qwest. Consequently, Qwest would be discouraged from marketing to McLeod customers.

D. The Proposed Tariff is Inconsistent with Other Provisions of State and Federal Law

The Department makes credible claims that portions of the new charge would be used to defray costs of McLeod meeting its obligation to provide local number portability, in violation of the Act's exclusive jurisdiction over local number portability.⁹

The proposed tariff allows for McLeod to disconnect services after a 10 day written notice. This violates Minn. Rules, part 7812.2210, subp. 11, which requires Commission approval to discontinue service or physical connection to another carrier.

E. The Interconnection Negotiation Process is the Appropriate Vehicle for Resolving the Issues Underlying the Proposed Tariff

The Commission agrees with the DOC that the proper recourse in this situation is for the parties to negotiate an amendment to their ICA regarding this matter. First, the subject of disconnection is part of the parties' ICA and federal policy favors the use of the negotiation process set forth in the Act to resolve issues that are the subject of ICAs. Further, in this case both McLeod and Qwest have indicated a willingness to enter into negotiations to amend their ICA.

Finally, this is consistent with the Commission's recent action in the *CenturyTel*¹⁰ case and the Commission's recognition that interconnection negotiations are the primary vehicle for resolving interconnection issues.

For these reasons, the Commission will reject the proposed tariff.

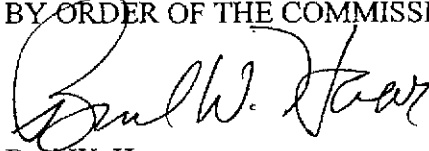
⁹ *In the Matter of Telephone Number Portability*, Third Report and Order, CC Docket No. 95-116, Released May 12, 1998, p.20, citing 47 U.S.C. §251(e)(2).

¹⁰ *In the Matter of Wireless Local Termination Tariff Applicable to Commercial Mobile Radio Service Providers That Do Not Have Interconnection Agreements with CenturyTel of Minnesota*, Docket No. P-551/M-03-811, ORDER REQUIRING REVISED FILING (November 18, 2003); ORDER AFFIRMING PRIOR ORDER AND INVITING REVISED FILING (July 12, 2004)(CenturyTel).

ORDER

1. The wholesale service charge proposed by McLeod is rejected.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

A handwritten signature in dark ink, appearing to read "Burl W. Haar", is written over the printed name.

Burl W. Haar
Executive Secretary

(SEAL)

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